

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

THURSDAY, THE 26TH JULY 2007 / 4TH SRAVANA 1929

CRL.A.No. 976 of 2007(B)

SC.531/2005 ON THE FILE OF THE COURT OF THE ADDL. SESSIONS JUDGE (ADHOC)-II,
THODUPUZHA.

CP.27/2005 of JUDL. MAGISTRATE OF FIRST CLASS COURT, ADIMALI
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APPELLANT: APPELLANT

ITHAPIRI,
C.NO.1542, CENTRAL PRISON, TRIVANDRUM.

BY ADV. ADV.R.V.SUJIT KUMAR(STATE BRIEF)

RESPONDENT:

STATE OF KERALA, REPRESENTED BY
A PUBLIC PROSECUTOR.

BY PUBLIC PROSECUTOR SRI.C.M.KAMAPPU

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD
ON 26/07/2007, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

K.Thankappan, J.

Crl. A. No. 976 of 2007

Dated this the 26th day of July, 2007

JUDMENT

Appellant, an aged man of 70 years, faced trial for offence punishable under section 55(g) of the the Abkari Act on the allegation that he was found in possession of 45 litres of wash. To prove the charge against the appellant, the prosecution examined PWs.1 to 5 and produced Exts.P1 to P9. The trial court accepted the sole evidence of PW4 Excise Inspector who detected the offence and found that the appellant guilty of offence punishable under section 55(g) of the Abkari Act. PW4 stated that on 20-8-2003 at 5 P.M. while he was on patrol duty, he got information that the appellant was possessing wash in his house for distillation of arrack. He proceeded to the house of the appellant and searched the house. A 30 litre pot and a 15 litre can were found in the kitchen and on examination it was found that the can and the post contained 45 litres of wash. PW4 arrested the appellant, seized the wash and registered the crime. The case was investigated and charge was laid before the court. After closing the evidence, the appellant was questioned under section 313 of Cr.P.C. He denied the allegation and stated that MOs.1 and 2 were not seized from the house and the above material objects were taken from nearby estate and

the case was foisted against him by the Excise party. Relying on the evidence adduced by the prosecution both, oral and documentary, the trial court found the appellant guilty under section 55(g) of the the Abkari Act and he was convicted thereunder and sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs.1,00,000/- and in default to undergo rigorous imprisonment for three months. The conviction and sentence awarded against the appellant are assailed in this appeal.

2. Since the appeal has been filed through the jail authorities and no counsel has been engaged to defend the case of the appellant, this Court appointed a member of State Brief panel to defend the case of the appellant.

3. This Court heard the learned counsel for the appellant and the learned Public Prosecutor.

4. Learned counsel for the appellant submits that the trial court has committed serious error in finding the appellant guilty under section 55(g) of the Abkari Act on the basis of the evidence of PW4, as there was no independent evidence to support the evidence of PW4. The learned counsel also submits that the evidence of PW4 is not enough to prove that the appellant was found in possession of the contraband article, as the definite case of PWs.1 and 2, independent witnesses, was that they had not seen any

contraband article seized from the house of the appellant and they had stated that they signed the paper as directed by the excise men. It is submitted that even if the evidence of PW4 is accepted, the finding of the trial court that the appellant had committed an offence punishable under section 55(g) of the Abkari Act is not justifiable, as the prosecution had not proved the wash kept by the appellant is for preparation of arrack.

5. The trial court had considered the evidence of PW4 and found that the prosecution had succeeded in proving that the appellant committed an offence punishable under section 55(g) of the Abkari Act. As per Ext.P9 chemical analysis report, the first sample contained 4.78% ethyle alcohol and the second sample contained 8.65 ethyle alcohol by volume. PWs.1 and 2 stated that they did not see excise men searching the house of the appellant, seizing wash and arresting the appellant. The evidence of PW1 shows that he signed Ext.P1 at Padikappu at the request of the excise officials. The evidence of PW2 shows that he signed Ext.P1 at his shop. In this context, it is relevant to note that in Ext.P1 mahazar names of four excise officials were mentioned, but non of them was examined. It has come out in evidence that other persons were residing nearby or conducting shops nearby, but they were not made witnesses. Apart from the above, it is seen that there was no material other than MOs.1 and 2 to prove that the

wash was kept for preparation of arrack. The case set up by the appellant is that the the material objects were taken from a nearby estate and the case was foisted against him. For conducting a search in the house, it is obligatory on the part of the authorized officer to comply with section 31 of the Abkari Act. There is no evidence to show that the above procedure was complied with by PW4. The prosecution case is that the appellant was found in possession of 45 litres of wash for the purpose of distillation of arrack and the same was stored in the house. The prosecution must allege and prove that the wash was kept for the purpose of manufacturing liquor. In this context, there is no evidence to show that the wash was kept for the purpose of manufacturing liquor. In the above circumstances, this Court is of the view that the finding of the trial court that the appellant had committed an offence under section 55(g) of the Act is not sustainable. In a decision reported in Sudhepan @ Aniyam V. State of Kerala (2005(2) KLT (Cri) 631) this Court held that to attract an offence under section 55(a) of the the Abkari Act, the prosecution must allege and prove that possession of the contraband liquor was incidental or in connection with export, import, transport or transit of liquor. Therefore, the finding of the trial court that the appellant found guilty under section 55(g) of the Abkari Act is not sustainable.

6. In the above circumstances, the conviction and sentence awarded against the appellant/accused in S.C.No.531/2005 on the file of the Court of the Addl. Sessions Judge (Adhoc)-II, Thodupuzha are set aside and the appellant is acquitted. Hence, the appellant shall be released forthwith unless required in any other case.

K. Thankappan,
Judge.

K. Thankappan,J.

Crl.A. No. 976/2007

Judgment

26-7-2007